TAKING JUDGES OUT OF POLITICS

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Over a large portion of this country the belief is prevalent that judges, in order to serve the public faithfully, must be chosen by popular vote and hold office for a comparatively brief term. This belief conforms to doctrine which has enjoyed overwhelming popularity in this country; it also conforms to the practical wishes of numerous lawyers who are ambitious to wear the ermine. The offspring of an era of dogmatic optimism, it is fitting that this easy doctrine should now be challenged by a principle which reflects the disillusion and skepticism of the present time.

The new principle denies the ability of the electorate to make wise selection for a highly technical branch of work. There can be no dispute of the claim that the work of the judge is exceedingly technical. The electorate broadly cannot correctly appraise the relative ability of lawyers, and much less can it estimate with accuracy the fitness of members of the bar to hold judicial office.

The conflict between the old doctrine, so firmly entrenched, and the new principle—new at least as a working proposition in American politics—is only now beginning. It will be interesting to observe the progress of this conflict.

There is no settled world practice with respect to the selection of judges, but appointment in some form is nearly universal. England learned long before our Revolution that judges must not be subject to removal at the pleasure of the appointing power. The difficulty was overcome by guaranteeing life tenure subject only to impeachment and trial for malfeasance. Under this condition the English bench has gradually become the tractable servant of democracy. Even in appointment, democratic forces control but without any sacrifice of the principle of expertness in selection. If any person be disposed to dispute the statement that the English bench is essentially democratic, let him consider the extreme caution observed by that bench not to usurp legislative functions; its will is always subjugated to the will of the people's Parliament.

In England the bench is recruited directly from that wing of the legal profession which is devoted solely to the trial of contentious issues. The theory governing this choice is that the experienced barrister, by his familiarity with judicial procedure and his expertness in analyzing issues, is able to decide causes more speedily and more correctly than any other type of lawyer. In that country the dissatisfaction with the present situation is directed to the alleged fact that the barrister-judge tends to exalt the principle of contentiousness, thus contributing to the high cost of litigation.

A certain equilibrium was reached long ago in Germany along quite different lines. The theory there has been that the work of the judge is so peculiar as to warrant special training. German judges are not taken from the ranks of successful lawyers; they are trained from youth for the bench, and are advanced step by step from the less responsible judicial positions to the highest. Such undercurrent of dissatisfaction as there exists is directed to the fact that judicial training of this sort produces a bench out of touch with the ordinary affairs of life, that it tends to exalt the academic at the expense of the practical.

In the formative period of American institutions there was present a dominant intention to escape historic evils of the judiciary. Because an English bench had proved at an earlier time to be subservient to royalty there was a disposition to view all judges in a skeptical light. In fact a considerable element of American political principle consisted of fortifying society against evils which had existed at some previous time in the parent state.

The first fifty years of the national life were years in which expertness was at a discount, especially in the newer communities. It is not hard to understand the change in all the newer states, and in some of the older ones, to an elective judiciary and short tenure.

Nor is it so difficult to appreciate the fact that for a long time the defects of the new dispensation were obscured. Ours was a rough and ready society and an elected judiciary seemed sympathetic with the aims of that society. Class divisions came later. The corruption of party, invisible government, and bi-partisanship, all came later.

Analysis of conditions in states which elect judges points to two seemingly divergent facts, both of which must be kept in mind.

We must realize that there have been a great many capable and

successful elected judges, enough in most jurisdictions to conceal in large measure the second fact, which is that the elected judiciary has, broadly, fallen short of a standard of reasonable efficiency. These conclusions are not inconsistent. A judicial system is, in a sense, no stronger than its weakest link.

While recognizing the fact that many elected judges have been satisfactory, and a few ideally qualified to judge, it must be added that the really competent judge has been the exception rather than the type. Nor is it difficult to account for numerous exceptions under this head. Even with a hit-and-miss method of selection it would be miraculous if some talent were not secured for the bench. A mere choice by lot would inevitably score some hits. The tremendous steadying effect of the judicial position must also receive considerable credit. We must remember that the beginner on the bench, if at all qualified, is in an ideal position to be educated.

No article of ordinary length could contain a full defense of the claim that the elective bench is on the whole unrepresentative of the highest talent of the legal profession. An observer may say that he knows this to be true of his own knowledge, just as he knows that there are occasional excellent judges who are elected term after term. The general public dissatisfaction with elected judges is evidenced by frequent dismissals; it is evidenced also by the origin and spread of the judicial recall doctrine; it is evidenced finally by numerous attempts to bolster up the system by improved methods of nominating and balloting. A most convincing arraignment of elected judges as a class will be found in the preface to the recent supplement to Wigmore's *Evidence*.

Just as the people broadly lack acquaintance with the qualities which make for judicial strength so do they lack precise knowledge of the shortcomings of their servants in a field so involved and technical. They have not been aware that their bitter struggle during the last two decades to socialize their law has been against elected judges. This has been compactly set forth in the notable report of the special committee on "Reform in the Administration of Justice" of the National Economic League, as follows:

> The constructive work in American law, the adaptation of English case law and English statutes to the needs of a new country and the shaping of them into an American common law, was done by appointed judges while most of the technicality of procedure, mechanical jurisprudence and narrow adherence to eight-

eenth-century absolute ideas of which the public now complains is the work of elected judges. The illiberal decisions of the last quarter of the nineteenth century to which objection is made today were almost wholly the work of popularly elected judges with short tenure. Moreover, where today we have appointive courts these courts in conservative communities have been liberal in questions of constitutional law where elective judges, holding for short terms, have been strict and reactionary. For illustration one may compare the decisions of the Supreme Court of the United States and of the Supreme Judicial court of Massachusetts on the subject of liberty of contract with those of the supreme courts of Illinois and Missouri. Also one may compare the decisions of the highest courts of Massachusetts and of New Jersey on the subject of workmen's compensation legislation with the pronouncement of the Court of Appeals of New York. So in procedure, the judicial application of the Massachusetts practice act should be compared with the fate of the New York Code of Civil Procedure of 1848. The later New York code attempted the impossible in the way of detail. But it would have been quite as easy to make technicality of procedure an end in Massachusetts as in New York. A liberal application of the New York code of 1848 by strong judges, resisting the attempt of counsel to use the code in the game of litigation, might have achieved a modern procedure half a century ago. Under our systems of making law through judicial empiricism almost everything turns on the strength, capacity and learning of the judge. We require much more of a judge than popularity or honest mediocrity or ignorant zeal for the public welfare can bring about.

The earlier elected judges found their work easier because the law had not yet entered upon its period of class stress. The typical American community of forty or fifty years ago was rural in character and the citizenship was comparatively homogeneous in aims and ideals. The divisions between capital and labor were yet to be. The stress due to the bending of an ancient individualistic philosophy of law to modern social needs was undreamt of.

These things came in the fullness of time. There is reason to believe that a more cultured type of judge would have understood this conflict better. It is plausible to hold that a more independent tenure would have permitted the judge to move gracefully from the old dispensation to the new for that very event is observable in states having life tenure and in the Federal Supreme Court.

The notorious deprivation of judicial power through minutely regulated statutory procedure, which resulted in making the trial judge little more than a passive moderator of a contentious proceeding, came after the "democratization" of the bench. This stripping the judiciary of the least powers for self-government has been a potent though subtle force to undermine the bench and pre-

vent a healthy, concerted and constructive movement for rendering justice efficiently.

The spread of the elective principle, if it did not directly encourage, at least did not interfere with the development of political supremacy in the supreme courts of the land. This has been due directly to the irresponsibility of legislatures and indirectly to the limitation of legislative powers in the later state constitutions. In typical states the supreme court virtually constitutes a third house with a fairly effective veto over legislation, but without power to shape and direct the evolution of judicial procedure. It would be difficult to imagine a more genuine departure from the theory of separation of powers.

There has been also, coincident with that development of classes which destroyed civic homogeneity, the growth of vast cities with the inevitable lowering of the average intelligence of the voter, and his reduction to the level of a pawn in the hands of party organizations. In these great cities litigation has been concentrated and an almost total absence of judicial organization and system has prevailed.

Observation of a broad field reveals the fact that judicial success is in inverse ratio to the massing of population and industry. Various expedients to improve the quality of the bench have been tried and projected. These fall roughly into two classes. One class comprises extra-legal expedients intended to bolster up an inefficient form of judicial selection. In the more enlightened communities there has been more or less success in departing from the spirit of the elective doctrine while retaining the form. These attempts constitute virtually an attempt to substitute a *de facto* method of appointment. The voters instinctively delegate their powers of selection to a more or less expert class. This phase of the subject is interestingly discussed in an article on "Methods of Selecting and Retiring Judges in a Metropolitan District" in the March, 1914, number of *The Annals*.

It is shown that the conservative citizenship of Wisconsin has achieved a measure of success by tacitly permitting the leaders of the bar to control nominations. The result has been on the whole better than in many states which could be named but it is not entitled to implicit faith. Being an extra-legal method, dependent upon continuity of tradition, it involves reëlection of the sitting

judge regardless of his qualifications. It is true that Wisconsin has succeeded in this manner in banishing partisanship from the bench, but the reverse fact must be noted that the retention of unpopular judges has resulted in the establishment in about thirty counties of special municipal courts intended to permit suitors to escape the regular court in a majority of causes. The result is a lack of organization, a multiplying of agencies, and an increase of cost which is leading now to a movement for general organic reform. In North Carolina over one hundred special courts have been spawned for similar reasons and conditions there may properly be called chaotic.

In Colorado the organized bar has made a brave attempt to direct voters. A most complex system of bar primaries has been evolved. The outcome is still in doubt. If the result is permanent betterment it will be but another proof that reform of the popular election of judges comes about by a *de facto* abandonment of the principle. It is still an open question whether the attempt will not serve to rive the bar into two or more contending bodies, in which case actual harm will have been done without commensurate benefit, for the voter will be more mystified than before.

The other class of efforts to improve the situation is doctrinaire, in keeping with the idea of universal participation in the selection of judges. It goes upon the theory of curing the defects of democracy by a larger dose of democracy. It attempts in various ways to compel the electorate to asume all the powers of nomination and election and to ponder well the judicial ballot. In this class fall the numerous statutes providing for direct nominations and the less common but rapidly growing laws which result in placing the nonpartisan list of judicial condidates in a separate column on the general ballot, or even better, upon a separate judicial ballot.

There has been in the past two years some experience under these forms. An attempt to get a scientific estimate of the results has brought interesting communications to the writer's desk. It is apparent that experience thus far justifies only pessimism. The testimony is conclusive from a number of states which are trying ballot reform that the tendency is to discourage legal expertness among judicial candidates. The judge seeking reëlection finds himself without an organization to push his candidacy. He finds himself confronted by rivals who are virtually self-nominated and who do

not shrink from any detail of "running for office" because of modesty or delicacy concerning the traditions of the bench. He must meet these rivals on their own ground, which means a "glad hand" campaign throughout the district or state. He finds that the candidate who devotes all his time to his canvass, who belongs to the largest number of voluntary organizations and secret societies, who is most unblushing in telling of his own goodness of heart and promising faithful service, who is, in short, a "good mixer," has the best chance for winning as surely as the gullible voters outnumber the sophisticated. The sitting judge finds that it is largely a matter of advertisement, involving a disproportionate cost in time and money, and that he is handicapped from the outset through the impossibility of asserting his own best claims to the position. In a community not ideally discreet and sagacious, to put the matter plainly, genuine ability is penalized and demogoguery is put at a premium.

This does not mean that a useful judge is inevitably defeated at the non-partisan primary and election. There are some judges who combine popularity with judicial talent, judges of such fortunate temperament that they can cope with the new problem, but they are not common. It is easy to foresee a general cheapening of the personnel of the bench in the course of three or four terms. Activity out of office will weigh disproportionately in the contest for survival, and judicial position, already lacking in attractiveness because of uncertain tenure and low salaries, will come in time, even more than now, to be beneath the aim of the seriously ambitious lawyer.

It must be admitted that this movement, in so far as it is honestly directed *toward lessening partisanship* among judges, is successful. Partisanship cannot survive the non-partisan ballot. But in few localities has there been any serious defect of this sort. Convention nominated judges have been notably free from this evil, especially in the western states where the reform has been most prevalent. This is due in part to the pitiless publicity under which political decisions are rendered, for they must justify themselves to the existing law, and partly to the inherent decency of our judges in all but a very few jurisdictions.

But if partisanship is killed it is still impossible to say that the new method "takes the judge out of politics," and this is what

was really intended. For the reasons offered the new type of self-nominated and self-elected judge is far more the politician than the judge whom he succeeds. He must at all hazards keep his name before the public, and the methods to which he is often forced to resort are both disgusting and pathetic.

The broad and general faults of our elected judiciary have been due not to partisanship, but to lack of broad culture, to inexpertness in the law, to dependence arising from uncertainty of tenure, to the restraint imposed by thousands of sections of minutely and inconsistently legislated rules, and above all, to a lack of simple business organization. The judges have not constituted a wieldly body able to react to the reasonable public demand for promptness and economy of effort. Specialization has been limited. The judicial body has not been permitted to avail itself of its own best ability. A system created during pioneer conditions has persisted under the formidable stresses of modern urban life and has notoriously lacked leadership and standards of accomplishment.

The widespread attempts to make popular election of judges successful by the two methods described, namely: the adoption of extra-legal measures to bolster up a defective system, and the larger dose of democracy implied by non-partisan ballots, prove that the subject is one of growing interest. The people will not rest until judicial processes are more simple and economical. If they do not accomplish the ultimate reform by steps now attempted, they will experiment further. Nomination by petition and election by handshaking appear to be the last word in attempts to make the old doctrine yield good results. Failure along this line will bring the constructive forces of citizenship directly to the new principle which is fundamental in short ballot reform. The futility of trying to compel voters to do what they are inherently incapable of doing must eventually be accepted. In the typical community of seventy years ago moderate success was attainable because of the comparative simplicity of the voters' duties and the relatively high order of civic ability. The voter of today who corresponds to his intelligent and high-minded grandfather, even if he is not outnumbered, is hopelessly ignorant of the qualifications of judicial candidates if he lives in a typical large city and is called upon to squander his limited political wisdom over a field of fifty or one hundred offices ranging from coroner to president. In one

city the various ballots aggregate one hundred and forty-four offices and judges to the number of seventy are elected at least every six years.

The doctrinaire cure of this evil by a larger dose of democracy is like multiplying ciphers. It has been better expressed as equivalent to holding a chicken's beak to a chalkline. The chicken is forced to concentrate its attention, but a cataleptic condition, not wisdom, is achieved.

The writer believes that the people of the central and western states are far nearer pregnant skepticism of the old doctrine than is generally supposed. In the state of California, a year ago, a first campaign for a better method of selection showed astonishing progress. The fight here was made on the proposal to permit the governor to appoint for the usual term subject to a popular ratification at the polls. In South Dakota leaders at the bar have started an interesting movement away from popular election of judges.

The matter is essentially difficult of discussion. We are all afraid of a doctrine which has so dominated our entire political thought. In most bar association meetings, even, it is difficult to discuss the subject of judicial selection except by beginning where an old-fashioned Fourth of July oration leaves off. Judges themselves are effectually barred from advising freely. Many judges prefer to adhere to a system which they feel they have mastered. Skeptics among them fear to criticize the system lest their words be used against them by jealous rivals. Former judges who have been summarily retired by the voters, however unjustly, have their lips sealed by their sense of good political sportsmanship. The subject is all the time complicated by the fact that we have some excellent judges. Our abounding faith in special providence encourages us always to hope that the next election will mark a revival of civic virtue and wisdom. In this respect we are in the same position respecting judges as were the people of the typical city a few years ago with respect to their aldermen. The hope of turning the rascals out springs eternal. But in scores of these cities the short ballot, as part of a simple, wieldy, responsible form of government, absolving the voter from the need for superhuman intelligence, has led the way out of the doctrinal morass.

No discussion of political reform can ignore the mighty revolution in municipal government, now finding its highest level in the

city manager-commission form of government. The secret of success lies in the fact that a workable delegation of political powers has been discovered.

One of the conditions which most militates against like discoveries respecting judicial office is the fact that it is almost universally assumed, even among graduates of political science courses, that there are but two ways of selecting judges; that we must either elect them for short terms or have them appointed by the Governor for life. We need most emphatically to realize that there are numerous ways of selecting judges. A number of variations on traditional methods are in use in this country. We have appointment for life by the executive, and appointment for a term. In several states the legislature makes the choice. It is conceivable that judges should be selected in a great variety of ways. The best results may be presumed to accompany a method which consists of selection by a thoroughly expert agent who is responsible for the due administration of justice. At the present time such a responsible judicial manager is just coming into being in the person of the executive head of an organized court, of which the municipal court of Chicago, and a number patterned after it, are examples. Such a judicial manager, whether styled chief justice, or president judge, or something else, is made responsible in large measure for the administration of justice within the jurisdiction alloted to his court. These courts constitute the bright spots in our judicial explorations. There is one way to increase the responsibility of the judicial manager and that is by permitting him some measure of freedom in finding the judges who are to man his branch courts.

Such a manager is far more competent to make a selection from among the lawyers practicing in his court than is the governor. His motive for selecting capable judges is higher than can be presumed in any other quarter, for his own success depends upon the personnel of his court.

It is difficult for us to conceive of a power of appointment not coupled with a ball and chain check. But if the proposed method is to realize expectations it must have a check quite unlike the kind we are used to. One of the most plausible proposals is that the chief justice (whose character of judicial manager must not be lost sight of despite the title) should be limited to selections from a public eligible list. This list should contain twice as many names

as there are possible vacancies. Names could be added to it by the judicial council, or governing board of the court, for every modern organized court should have such a judicial council, composed of the heads of the various divisions, of which the chief justice would be the executive officer.

In the chaotic condition of our bar such an eligible list would be like ballast in a cranky ship. At present we have no way to put the seal of authentication upon worthy lawyers. Such an eligible list, twice as large in number as the local bench, would constitute a roll of honor which lawyers would aspire to, and its members would be friends of the court in a very practical way.

We need to rid our minds of the notion that appointment and life tenure are inseparable. There is no reason why appointment should not be for a limited period. If the foregoing plan appears to afford a practical scheme for delegating political power—for curing the ills of democracy by a dose of more intelligent and practical democracy—there is no reason why it should not be instituted with appointment to a limited term, giving the electorate a right to ballot on the appointee at the end of a three-, or four-, or even six-year period of probation. The ballot should be limited to a yes or no vote on the proposition of retaining the incumbent. This would be infinitely more fair to the judge than the present mad scramble for position against the field. At the same time it would permit the electorate, if cause existed, to retire the undesired judge in a sober manner.[1]

Of course one has to admit that under an ideal form of appointment and service in a properly organized and directed court, the possibility of offense justifying retirement would be exceedingly small. And one vote of approval should permit a term of greater length than the probative term, say eight or ten years.

We are not done with experiment by any means. Dissatisfaction was never more widespread. Gradually the pragmatic spirit must overcome blind doctrine. But such glimmer of light as can be descried in the field of judicial selection is faint compared with the rosy glow betokening dawn in the field of judicial organization. In plainer words it now appears probable that before

[1] Bulletin IV A of the American Judicature Society contains these forms for appointment and retirement in legislative language. Copies are mailed free from the society's office, 38 S. Dearborn St., Chicago.

attaining perfection in methods of selection we will solve the problem of making our courts, first in our large cities, where chaos is least endurable, and finally in the states, efficient organizations, capable of employing specialization, responsive to economic demands, self-governing and self-conscious.

This tremendous reformation, lifting our judiciary out of one century into another, is already well started. Its influence is irresistible in spite of entrenched privilege and constitutional obstacles. The progress of reform is likely to be along this line: organization will give us responsible courts which will secure public confidence by earning it; and confidence in the judiciary once re-established it will only be a matter of time and readjustment to arrive at a more friendly attitude toward judicial servants as expressed in methods of selection.

If this prophecy proves true it will be substantially a parallel to the municipal reform already conspicuous. For more than a generation we undertook to clarify city politics by electing "good aldermen." We were always just about to attain this goal, and always short of attainment. Genuine progress came when the people changed the rules of a game which they could not beat. So in the judiciary the problem of selection will be solved not by securing an electorate a little lower than the angels but by adopting a workable scheme of delegated powers.

Something must be added to avoid a serious inconsistency. It may be objected that since the typical state supreme court has been called virtually a third house there is every reason why the electorate should directly participate in selecting its highest judges. A revolutionary change is not to be expected so early in this field, it must be admitted. The writer believes that supreme courts will in time relinquish much of the political power now exercised. It came about because sovereignty took refuge with the more conservative and responsible power, for whatever criticism may be passed on the courts it must be admitted that they have been less erratic and irresponsible than legislatures. A change will come when legislatures become truly representative and responsible. Apparently this reform depends upon a considerable reduction in numbers and possibly a linking with the executive power to create a working partnership. Such a reorganized legislature, more cautious in operation, adopting scientific expertness in phraseology,

would in time develop self-respect to such a degree that it could cope with the usurpation of the judiciary. There is no doubt that ultimate political power resides in the legislative branch. It has been diffused by incompetence, but only for a time. Signs of change are not wanting. Readjustment, either with or without serious changes in constitutions, is likely to relieve the courts of their odious supervision, permitting them to work out their own salvation, and ultimately justifying the doctrine of separation of powers which we cling to in theory however we have departed from it in practice.